UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

COMAU, INC.
Respondent Employer

and **Cases 7-CA-52614 and 7-CA-52939**

AUTOMATED SYSTEMS WORKERS LOCAL 1123, affiliated with CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
Charging Party

and

COMAU EMPLOYEES ASSOCIATION (CEA)
Party in Interest

COMAU EMPLOYEES ASSOCIATION (CEA)
Respondent Union

and **Case 7-CB-16912**

AUTOMATED SYSTEMS WORKERS LOCAL 1123, affiliated with CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
Charging Party
_____/

RESPONDENT UNION CEA'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE

The history of the bargaining unit is relevant to understanding the events in this case. The unit consists of skilled tradespeople including toolmakers, grinders machinists, electricians, pipefitters and others. In December of 2009, there were about 178 members in the bargaining unit, and there are about the same number today[1].

Their employer is Comau, Inc., a manufacturer of automated assembly lines for the auto industry and for other industries. The skilled tradespeople build the assembly lines "from scratch," and the assembly lines are then delivered to and installed at the customer's facility. The company has a number of facilities in the metropolitan Detroit area. Partly because the company has acquired other companies in related businesses, as well as for other reasons, employees at Comau are represented by a number of different unions.

From the mid-1970s to 2007, the employees of the bargaining unit were represented by an independent union whose members consisted entirely of employees of this employer or its predecessor corporation. This union successfully negotiated a number of collective bargaining agreements during those decades. (Tr 968, 969)[2]

Originally known as the PEA, the independent union changed its name in 2004 to the Automated Systems Workers ("ASW"). (Tr 862, 1011) The change was motivated by, among other things, the possibility of expanding its membership to include employees of other employers. (Tr 862, 862, 1011) The renamed union continued to remain independent of any larger labor organization, and successfully negotiated a contract with the employer in 2005, for the period ending March 2, 2008. (Tr 1011).

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[1] Recently laid-off employees remain members of the bargaining unit and remain eligible to vote

[2] "Tr" indicates that the reference is to the designated page or pages of the hearing transcript.

In 2007, the union considered affiliation with the Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America ("MRCC"). (Tr 863, 1012) At a meeting with the membership, proponents of the MRCC affiliation touted the advantages of affiliation, and made a number of representations about the benefits that would accrue to the employees in return for the substantial dues increase which the affiliation would require. The benefits were to include increased training and greater opportunities for laid-off workers to find work with other employers where the MRCC had contracts. (Tr 865, 974, 1012, 1050) In return for those benefits, affiliation with the MRCC would require a substantial dues increase. In addition to the $20 dues paid to the PEA/ASW, the employees would pay 2% of their gross wages to the MRCC. (Tr 903, 939, 1013, 1051)

The proponents of merger also presented to the bargaining unit a document entitled "Questions on UBC/MRCC union merge." (Respondent Union Exhibit 2). In a question and answer format, it purported to address the concerns of the membership. Question 30 read as follows:

> Q: Will there be an escape clause, if merger doesn't work for ASW?
> A: succession [sic, i.e., secession] is always an option, ASW members can vote out MRCC/UBC, if merge is not agreeable, with our union body.

Based upon the representations made by proponents of the MRCC, the union members voted in favor of affiliation. The formerly independent ASW became ASW Local 1123, a division of the MRCC. (Tr 139, 142)

An important personnel change occurred at the time of the affiliation. Mr. Pete Reuter had been the president of the unaffiliated ASW and Mr. Darrell Robertson had been its treasurer. (Tr 139) Both worked at Comau, side-by-side with the other members of the bargaining unit. (Tr 974, 975, 1020) After the affiliation, both left Comau and instead of being skilled tradesmen,

became full-time employees of the MRCC. (Tr 143, 1019) Mr. Robertson, now the president of the ASW 1123, testified that he made "site visits" to the bargaining unit about once a month. Mr. Reuter became the director, and was rarely seen at Comau. Both Mr. Reuter and Mr. Robertson were appointed by the MRCC; no election was held from March of 2007 until after June of 2009, a span of over two years. (Tr 149, 371, 764)

As noted above, a collective bargaining agreement with Comau, Inc. was already in effect at the time of the affiliation, having been negotiated by the ASW while it was still independent. That contract expired by its terms on March 2, 2008. The ASW engaged in bargaining with the employer, and the parties agreed to extend the contract during the negotiations, terminable on 14 days notice. However, the parties were unable to reach a new agreement. On December 3, 2008, the employer declared that the parties had reached an impasse, gave notice to terminate the contract, and declared that it would impose its LBO on December 22, 2008. The imposed contract included new health care provisions, requiring premium sharing, co-pays and other cost sharing, which had not previously been the responsibility of the employees. These were the same provisions that were to come into effect on March 1, 2009. (Joint Exhibit 1, Article 10)

The date of December 22, **2008** should not be confused with December 22, **2009**. While that may seem obvious, it has occasionally been the source of some confusion in this case. On December 22, **2008**, the employer imposed the LBO upon its employees. As will be discussed below, a year later, on December 22, **2009**, the employees submitted a "disaffection petition" to the employer and the employer recognized the Respondent, the CEA, as the exclusive collective bargaining agent for the bargaining unit.

After the ASW joined the MRCC in March of 2007, the bargaining unit became increasingly frustrated with the ASW. During the hearing, employees testified that the training

opportunities had failed to materialize. (Tr 918) For instance, Mr. Cecil Brewington testified that he and other welders had gone to the MRCC training facility to learn vertical welding. (Tr 1193) The teacher ignored them, telling them it was not his job to teach them. (Tr 1194) They did their best to teach themselves, but after a few days, they were told to leave. (Tr 1995, 1196)

Later, the employer, set up a vertical weld training room at the Comau facility, where a knowledgeable employee taught them vertical welding on his own time. (Tr 1199) At the hearing, the ASW secretary, Dave Baloga tried to take credit for that facility (Tr 1222), but admitted on cross examination that the employer had provided the space, set up the facility, and paid for the equipment. (Tr 1223-1224)

Another employee testified that the training he had received from the MRCC was the same as the training he received from the employer. (Tr 917)

Similarly, the promises of job opportunities came to very little. (Tr 1050) The unrebutted testimony of Willie Rushing was that only a few laid-off union members received job offers, and those jobs paid so poorly and included so many unreimbursed out-of-state travel expenses that the employees did not want them. (Tr 1050)

Thus, for a number of reasons, the members of the bargaining unit became dissatisfied with the ASW, especially since their representation included a very large dues increase. Where an employee had paid $240 a year to the independent ASW, the dues to the affiliated ASW could, with overtime, be ten times that much. (Tr 920, 935, 936) There was testimony that some employees had already become dissatisfied with the ASW and were discussing decertification as early as mid-2008. (Tr 945)

There was also testimony that the increase in the health care costs upset the employees. (Tr 952, 953) They became aware of the increase when the contract was imposed on December

22, 2008. Dan Molloy, who was then the Vice-President of the ASW, testified that the members became upset when they learned what was in the contract. (Tr 777,778) They were upset even before the money was taken out of their checks in March, 2009. (Tr 790, 819)

Employees were also upset by the fact that, after the employer imposed the contract, the ASW/MRCC representatives didn't seem like they were going to do anything about it. (Tr 777-780, 817) They were upset about the contract, but they were angry at the apparent indifference of the ASW/MRCC. (Tr 789, 813, 1050) Some even understood that the company had to change the health care program to match what was occurring elsewhere in the industry, but were upset about the ASW/MRCC's inaction. (Tr 780, 813, 952, 953).

Even the members of the ASW's local Executive Board were upset with the inaction. (Tr 813, 814) They heard a lot of complaints from members. (Tr 777, 789, 817) At that time, the Executive Board consisted of the officers of the ASW/MRCC and included Darrell Robertson and Pete Reuter. In early 2009, all of the members of the Executive Board, except Mr. Reuter and Mr. Robertson, held a meeting and unanimously voted to decertify their own union, the ASW/MRCC. (Tr 780, 887, 932, 1022, 1031) Three officers of the ASW (vice-president Molloy, secretary Baloga and treasurer Yale) went to the office of the NLRB to learn how to proceed with the decertification. (Tr 780). ASW secretary Dave Baloga was quoted as saying he supported the decertification because he worked for the men on the shop floor, not for Pete Reuter. (Tr 879, 934).

During the critical period after the contract had been imposed, the employees on the shop floor were "going nuts." (Tr 789). They were demanding action and explanations. (Tr 790). They wanted to meet with Pete Reuter, but he repeatedly declined to come to Comau. Instead he said that Darrell Robertson should go, but he, too, failed to appear when promised. (Tr 790). The

Executive Board received two written requests from shop floor employees that they take steps to decertify the ASW. (Tr 889, 890; CEA Exhibit 1).

It should be noted that a recurrent theme of the testimony before the ALJ was that Pete Reuter had repeatedly lied to the members of the bargaining unit, threatened them, and controlled who had positions with the union. (Tr 887, 910, 1016, 1017) At one point, the head of the MRCC, Doug Buckler, became aware of the discontent, and at an open union meeting proclaimed his own belief that Pete Reuter was a liar. (Tr 913, 914) Mr. Molloy, the ASW vice-president, gave emotional testimony about how he had been deceived by Mr. Reuter and had betrayed his co-workers because of threats by Mr. Reuter. (Tr 788) Mr. Reuter's high-handed and dishonest management of the ASW/MRCC was a significant factor in the employees' discontent with the union. (Tr 788, 789, 799)

The members of the Executive Board drafted the petition to decertify the ASW. (Respondent Union Exhibit 3) Most of them signed it. They also prepared a related document called an Authorization for Representation. (Respondent Union Exhibit 8) That is a document stating that the person signing it wanted to be represented by the CEA. (Tr 782) With the exception of Mr. Reuter and Mr. Robertson, who as MRCC employees were no longer members of the bargaining unit, all of the Executive Board members signed an Authorization for Representation. (Tr 782-787). The Executive Board began the process of gathering signatures. (Tr 787). All of this occurred before March 1, 2009.

When Peter Reuter heard about the decertification effort, he specifically threatened to sue the Executive Board members individually, to have them "drummed out" of the union and to have them fired from their jobs at Comau. (Tr 788, 799). Intimidated by Mr. Reuter, the Executive Board members decided to "go underground," and their signatures were crossed off

of the decertification petition, (though not the Authorizations for Representation). (Tr 887) They asked a non-committee-member, Willie Rushing, to take the petition to the membership. (Tr 791-92, 798, 879) All of this occurred before March 1, 2009.

A large number of members signed the decertification petition and Authorizations for Representation. Eighty-four (84) (including the Executive Board) signed the petition on or before February 29, representing 47% of the bargaining unit. This far exceeds the minimum 30% required by the NLRA to trigger an election. 29 USC §158(e)(1). By March 1, seventy-six (76) members of the bargaining unit had also signed the Authorizations for Representation (by the CEA) by that date, representing 42% of the membership.

March 1, 2009 is an important date for the GC. In fact, it is at the core of the GC's case. The only ULP which has been brought before the ALJ in this hearing is that which was alleged to have occurred on March 1, 2009 (which was the subject of a ULP hearing Nov 2009 in Case No. 7-CA-52106). On that date, the health care plan previously set forth in the December 22, 2008 LBO became effective.

It should be noted that this case involves no allegations of unfair labor practices occurring prior to March 1, 2009. The ASW had filed a charge with the Board, NLRB Case No. 7-CA-51886, on March 5, 2009. That charge alleged that the company had committed an unfair labor practice on December 22, 2008 in imposing its LBO, including the health care provisions. The Board investigated the charge and, on May 29, 2009 found the employer's action to have been lawful. The Board accordingly dismissed the charge. The ASW appealed the dismissal to the NLRB General Counsel in Washington D.C. The appeal was rejected; the General Counsel of the NLRB issued a letter opinion confirming that the employer's action on December 22, 2008 had been lawful. Thus this issue has been addressed by the NLRB and dismissed.

Furthermore, as a review of the Consolidated and Amended Complaint will show, there is no claim in this case that the employer's actions on December 22, 2008 constituted an unfair labor practice. Such a claim would be barred, in any event, by the six-month statute of limitations for filing an unfair labor practice charge.

Thus, there is only one unfair labor practice alleged in this case. The employer took no additional action on that date; in fact, March 1, 2009 was a Sunday. The employees saw no actual change on that date. All that occurred on March 1 was an invisible accounting transaction somewhere in the computers of the health plan provider and in Comau's payroll department. But the GC contended that on that date, by virtue of the fact that the health care plan became effective, the employer imposed new terms and conditions on the bargaining unit, that doing so was an unfair labor practice, that only after that date did the employees become dissatisfied with ASW 1123, and that it was the ULP which caused that dissatisfaction.

The GC's position in this case was that both the decertification petition and the later disaffection petition were caused (and therefore tainted) by employee dissatisfaction which resulted from that single alleged unfair labor practice (ULP). It is fair to state that the GC's case hinged on that alleged fact. If the unfair labor practice did not cause the employee dissatisfaction, i.e., if they were, for example, deeply dissatisfied with the ASW before the effective date of the health plan, then the Regional Director had no legal justification for preventing the election which would have occurred in May or June of 2009, and the Board has no legal justification now for attempting to set aside the December 2009 disaffection petition.

As noted, by March 1, 42% of the membership had also signed the Authorizations for Representation by the CEA. By March 10, that number had swollen to 66.2% of the membership. Even after the redaction of the signatures of the intimidated board members, 105 signatures

remained for submission to the Board, representing 58.9% of the membership. After the signatures had been accumulated, Willie Rushing, who had taken over responsibility for handling the decertification petition and authorization forms, turned them over to Dave Baloga and Dan Molloy, respectively the secretary and vice-president of the ASW, who held onto the petition and authorizations for a while to give Pete Reuter a chance to deliver on some his promises. (Tr 793-795) But when those promises were not fulfilled, and no serious changes occurred, Mr. Rushing asked them to return the documents to him, and he went ahead and filed them with the Board on April 14, 2009. (Tr 793-795).

When the petition and authorization forms were submitted to the Board, the petition was assigned case number 7-RD-3644. The Board began the process for conducting an election, and provided Mr. Rushing with a proposed stipulation for an election. But the process ground to a halt because of allegations made by the Charging Party in 7-CA-52106. Without notice to Mr. Rushing or to anyone else, the Board halted the election process.[3]

Time passed with no word from the Board. The employees became increasingly frustrated with the apparently endless delay. Willie Rushing testified that he was repeatedly asked about the status of the decertification petition by his fellow employees. (Tr 891)

With their decertification petition on hold, and no apparent progress on any other front, some of the employees prepared and circulated a petition to de-authorize the Charging Party and to recognize the CEA. (Tr 1026, 1030) In December of 2009, 103 employees (57.9%) of the bargaining unit signed the disaffection petition, which states:

> We, employees of Comau Inc. in the bargaining unit of the Automated Systems Workers Local 1123 (a Division of the Michigan Regional Council of

[3] On or about December 14, 2010, the Regional Director dismissed the decertification petition. That decision was timely appealed to the Board; as of the date of this writing, no decision has been issued.

> Carpenters), declare by our signatures below that we no longer want to be represented by that Union, and we request that Comau Inc. immediately stop recognizing that Union as our collective bargaining representative.
>
> We no longer want to be represented by the Automated Systems Workers Local 1123 (a Division of the Michigan Regional Council of Carpenters) because of the excessive dues that Union charges us each month and because it has not come through on its promises to increase job opportunities for us -- and not because Comau Inc. in the last year or so unilaterally implemented new terms of employment for us including the Company health care plan.
>
> We also declare by our signatures below that we want to be represented by the Comau Employees' Association, and we request that Comau Inc. immediately begin recognizing the Comau Employees' Association as our collective bargaining representative. For the below listed addressees's (sic) 20950 telegraph rd., 21000 telegraph rd., 21175 telegraph rd., Southfield, Mi. also 42850 W. 10 mile rd. Novi, Mi. and former Southfield machinist located at 44000 grand River, Novi, Mi. (EX CC) (emphasis added)

The opinions of the employees could not be clearer. Even after the passage of nine months, the employees still want to be represented by the CEA, not the ASW. Based upon the disaffection petition, the employer withdrew recognition of the ASW on December 22, 2009 and, as requested in that petition, recognized the CEA.

In addition to arguing that the disaffection petition is tainted by the employee dissatisfaction, the GC argued that it was tainted by the involvement of three individuals, members of the bargaining unit, who were "leaders." Leaders are selected for their skills and experience in the trade and for their leadership abilities. (Tr 594, 595, 599) They are not supervisors (the GC stipulated to that fact in the hearing), but members of the bargaining unit. (Tr 200) Non-leader employees testified that leaders were "co-workers", for instance. (Tr 1112, 1141) The GC argued that leaders are agents of the employer, and that their involvement in the activity of the CEA taints the disaffection petition.

The many factual objections to this claim will be discussed in greater detail below. But proper evaluation of this argument must include the fact that the current Executive Board of the

Charging Party, the ASW, includes three members who are leaders: Steve Wizinsky, Bob Wiesnewski and Greg Sobeck. Furthermore, the current president of the ASW, Darrell Robertson, was a leader for Comau all the time that he was treasurer of the ASW before the merger with the MRCC. (Tr 122, 131, 1043) Even Harry Yale, whose status as a leader supposedly tainted the disaffection petition, was a leader at the time that he was first elected secretary, then appointed treasurer of the ASW. In fact, the allegation that leaders are company agents is contradicted by the testimony of the President of the ASW, Darrell Robertson (a former leader himself), who testified that he had no problem with having leaders in positions of authority in the union. (Tr 123).

After the employer recognized the CEA, the record is notable for a fact that did not occur. The Regional Director did not seek an injunction at that time, when the decertification of the ASW was fresh. Instead, the next relevant event was the successful negotiation, five months later, of a new collective bargaining agreement, between the CEA and Comau, Inc., which was subsequently ratified by the members of the bargaining unit. That agreement was agreed to on May 14, 2010 and remains in effect today. Three months later, the Regional Director filed a petition in the United States District Court for the Eastern District of Michigan (Case No. 10-cv-13683) seeking a 10(j) injunction to undo the recognition of the union in December of 2009 as well as the employee-approved collective bargaining agreement of May, 2010.

On February 10, 2011, the Honorable Patrick J. Duggan issued his Opinion and Order, in which he denied the petition for injunction. Judge Duggan found that, while there was, indeed, a scintilla of evidence of a causal relationship between the alleged ULP and the disaffection of at least some members of the bargaining unit, "the Court questions whether it is sufficient to even

satisfy the Board's slight burden to demonstrate reasonable cause." (Opinion and Order, p 29). In any event, Judge Duggan determined that injunctive relief would not be just and proper:

> [The] evidence suggests that bargaining unit members did not reject the ASW/MRCC and seek representation by CEA *because of* Comau's March 1, 2009 unfair labor practice. In this Court's view, enjoining the representation of members by their chosen union, requiring them to be represented by a union they rejected without coercion, and blocking the enforcement of a CBA negotiated by the union chosen by the membership and ratified by the members is contrary to the NLRA's goals. (Id. at 27) Glasser ex rel. NLRB v. Comau, Inc. and Comau Employees Association, Civil Action No. 10-13683 (ED Mich, 2011) (emphasis in original).

STATEMENT OF QUESTIONS INVOLVED

I

Did the ALJ err in finding that Comau's unilateral implementation of its new employee health insurance plan on March 1, 2009 had a causal relationship to the loss of support for the ASW/MRCC, and that the disaffection petition therefore was tainted by the March 1, 2009 unfair labor practice?

Specific Exceptions: 1, 5, 6

II

Did the ALJ err in failing to find that the three leaders alleged to be Comau "agents" were not, in fact, agents of the employer for any purposes relevant to the employees' efforts to change union representation from the ASW/MRCC to the CEA or for any other relevant purpose?

Specific Exceptions: 2, 5, 6

III

Did the ALJ err in finding that the actions of Fred Lutz had a reasonable tendency to coerce Jeffrey T. Brown to sign the dues-checkoff authorization form and violated Section 8(b)(1)(a)?

Specific Exceptions: 3, 5, 6

IV

Did the ALJ err in ruling that the CEA could not call witnesses, all of whom were bargaining unit members, to testify about the many and varied reasons for their disaffection from the ASW/MRCC, because of the ALJ's erroneous belief that such testimony was not relevant to the inquiry, which in turn resulted from the ALJ's erroneous application of Master Slack?

Specific Exceptions: 4, 5, 6

V

Are the remedies ordered by the ALJ a reasonable or rational way to achieve the objectives of the National Labor Relations Act?

Specific Exceptions: 5, 6

ARGUMENT

I

The ALJ Erred In Finding That Comau's Unilateral Implementation Of Its New Employee Health Insurance Plan On March 1, 2009 Tainted The Disaffection Petition

A
The Employees Were Thoroughly Disaffected From The ASW Before The Alleged March 1, 2009 ULP

The right of the employees to freely choose their own collective bargaining representative is the foundation and bedrock of the NLRA:

> It is hereby declared to be the policy of the United States… [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing… 29 USC §151.

Section 7 of the Act gives effect to that policy by providing that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing… 29 USC §157

On December 22 of 2009, the employees signed and delivered a disaffection petition pursuant to the procedure approved and adopted by the Board in *Dana Corp*. 351 NLRB No. 28 (2007), and by that action legally and properly selected their bargaining representatives. The Board can subvert that process and cancel the rights of the employees only if the Board can show that the employee dissatisfaction with their prior union was caused by unfair labor practices of the employer.

> "For the disaffection to be attributable to the unfair labor practices, they "must have caused the employee disaffection... or at least had a `meaningful impact' in bringing about that disaffection." *Deblin Mfg. Corp.,* 208 N.L.R.B. 392 (1974). In short, <u>there must be a causal relationship</u> between the unlawful conduct and the petition of August-September 1982. *Olson Bodies, Inc.,* 206 NLRB 779 (1973)." Master Slack, 271 N.L.R.B. at 84. (emphasis added)

The record clearly establishes that the employee disaffection preceded the alleged unfair labor practice. Therefore, the necessary causal nexus does not exist. The GC failed to carry its burden of proof; there was no justification for disregarding the clear expression of employee intent, and the GC's complaint in this matter should have been rejected in its entirety.

First, as noted above, in early 2009, a majority of the bargaining unit signed the petition (the "decertification petition") to decertify the ASW, and a similar number signed Authorizations for Representation asking that the CEA be made the authorized bargaining representative of the bargaining unit. In fact, almost all of the ASW's own Executive Board signed that decertification.[4] The petition was actually prepared by officers of the ASW, including its then-secretary, Dave Baloga, in response to the concerns of the union membership, and it was the Executive Board which started the process of circulating it. So as early as February of 2009, before the alleged March 1 ULP, neither the union membership nor its own leaders wanted to keep the ASW as the bargaining representative.

The level of employee dissatisfaction is not merely a matter of numbers. The CEA submits that the actions of the ASW's own Executive Board, coupled with the signatures of 47% of the bargaining unit, is more than sufficient evidence that the membership was dissatisfied before the alleged ULP. A forty–seven percent dissatisfaction rate is significant in any context. The Act provides that only a 30% dissatisfaction rate is necessary to trigger an election. 29 USC §158(e)(1). A 47% disaffection rate, documented by employee signatures and supported by the union's own Executive Board, should not be disregarded so lightly.

[4] Two members of the Executive Board, Pete Reuter and Darrell Robertson, were directly employed by the MRCC, not Comau, Inc. Not being bargaining unit members, they would not have had the right to sign the petitions. Another board member, who is currently the secretary of the ASW, says he did not sign the petition, but signed Authorization for Representation by the CEA. There is testimony that all except Mr. Yale did, in fact, sign the petition. (Tr 887)

It is also reasonable to infer that the 47% who actually signed the petition were the tip of the iceberg, so to speak. The fact that so many signed is likely to indicate that even more were dissatisfied. That inference is borne out by the events occurring in the days immediately following March 1, 2009.

In this context, it is important to look at the non-magical nature of the date of March 1, 2009. On that Sunday morning, the health care plan technically went into effect. But the GC produced not a shred of evidence that the employees became aware of any change on that date or that the employees gained any new information on that date. If the GC contended that the effective date of the health care plan "caused" or "at least had a meaningful impact" upon employee disaffection, the GC should have produced at least some evidence to that effect. But the GC produced no evidence that the employees even knew about the ULP on the date it allegedly occurred, and there is no factual basis for the suggestion that it increased employee disaffection above the level that had existed the day before.

In evaluating the formation of any employee opinions which could have affected their attitude toward the ASW, the relevant date is not March 1, but March 6, 2009, the Friday on which the employees received their paychecks. That was the first paycheck from which the health care premiums were deducted. Dan Molloy, who was then the vice-president of the ASW, testified that, based on the information in the imposed contract, the employees were already upset about the health care plan, but that they became even more upset when they saw the money being taken from their checks. So the first date when the alleged ULP could have had a meaningful impact on employee opinion was March 6. There was no testimony whatsoever that the employee dissatisfaction increased on Sunday, March 1, the effective date of the health care changes.

Thus, the record makes it clear that the employees were ready to be rid of the ASW for a number of reasons well before the alleged ULP. Then, from March 1 through March 6, i.e, before any money had been taken from their paychecks, an additional 30 employees signed the petition. By March 6, a total of 114 had signed, representing 64% of the bargaining unit. There is no evidence that the level of employee dissatisfaction increased on Sunday, the technical date of the new obligation. The only evidence at all on that point was that of Mr. Molloy, then-vice-president of the ASW, who stated that, "Once the money came out of the checks they wanted to fry us." (Tr 832) (emphasis added) That was March 6, 2009.

In total, as a result of pre-existing dissatisfaction with the ASW, 64% of the bargaining unit signed the petition to decertify the ASW. The record clearly indicates that the employee dissatisfaction with the ASW had reached such a high level before the alleged ULP that the employees wanted to be rid of the ASW without regard to the alleged ULP.

At the same time that the decertification petition was made available to employees to sign, another document was also made available. The decertification petition only asked for an election to choose to decertify the ASW. The other document was an Authorization for Representation, and it stated that the signer wanted to be represented by the CEA. 65% of the employees signed that Authorization. Like the decertification petition, the names have been redacted by the Region to protect the identities of the signers, but the dates remain. By February 29, 76 employees, equal to 42.6% of the bargaining unit had asked to be represented by the CEA, and by March 6, that number had risen to 111, representing fully 62.3% of the bargaining unit.

The revolt of the ASW's own Executive Board and the widespread signing of the decertification petition demonstrate that the ASW and MRCC had clearly lost the hearts and

minds of the membership prior to, and therefore not as the result of, the alleged unfair labor practice of the employer.

B

Using The Objective Standard, It Is Unreasonable To Conclude That The Alleged ULP Caused The Employees' Disaffection

The fact that the employee disaffection preceded the alleged ULP is decisive and should end this inquiry. But it is nevertheless useful to address the alternative consideration, that is, if the pre-existing dissatisfaction were had not been so clearly established, would the GC have had a case?

The GC should not be able to prevail merely by showing that a ULP occurred. As noted previously, for the disaffection to be attributable to the unfair labor practices, they "must have caused the employee disaffection... or at least had a `meaningful impact' in bringing about that disaffection." *Deblin Mfg. Corp.,* 208 N.L.R.B. 392 (1974). There must be a causal relationship between the unlawful conduct and the petition in question. The evidence of that connection must be substantial:

> We have consistently held that the Board must adduce substantial evidence to support its finding that an employer's unfair labor practices tended to undermine a union's majority support. *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493 (D.C. Cir. 1996) (emphasis added).

> In addition to being substantial, the evidence must be specific:

> "there must be specific proof of a causal relationship between the unfair labor practice[s] and the ensuing events indicating a loss of support." *Champion Home Builders Co*., 350 NLRB 788, 791 (2007) (emphasis added).

> As the Board observed in *Saint Gobain Abrasives, Inc.,* 342 NLRB 434 (2004)

> [I]t is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights. *Id*. at 434.

These cases indicate that the GC had the burden of proving that the ULP caused the employee disaffection. But in the present case, the facts did not establish that connection.

There are four factors to be considered in determining whether the GC can carry that burden. Those factors were developed in *Master Slack Corporation*, 271 NLRB 78 (1984) and have been reiterated and recognized since that seminal decision:

> (1) the length of time between the unfair labor practices and the filing of the petition;
> (2) the nature of the alleged acts;
> (3) any possible tendency to cause employee disaffection; and
> (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

The third factor has often been described as setting forth an objective standard, i.e., the test is not whether the individuals believed that their disaffection resulted from company activity, but whether the unfair labor practices in question were of a kind which could reasonably tend to cause employee disaffection. As will be shown below, that is an unduly narrow reading of *Master Slack*, but the fact is that, in this case, the unfair labor practice alleged against this employer is <u>not</u> of a kind that would reasonably tend to induce disaffection.

In the present case, there is no objective basis for the suggestion that this kind of ULP could cause the employees to lose their ability to think for themselves. It is certainly true that an employer which behaves in a sufficiently egregious manner, committing multiple unfair labor practices over a significant period of time and abusing its position of strength, could influence its employees to view their union more negatively. But the recognition of that fact developed in cases where the employer's behavior was far more aggressive than that of Comau in this case.

For example, *Master Slack* is important because it articulated the four-factor test. But the facts of that case are also important, because they point out the shallowness of the GC's analysis

here. In *Master Slack*, there had been a long history of serious labor violations by the employer. Those serious and multiple efforts to derail the union should be compared to the acts of the employer in this case:

Master Slack	**Comau**
1. Illegally interrogating employees; 2. Threatening to move the plant; 3. Threatening to close the plant; 4. Threatening of discharge; 5. Actually discharging 28 employees; 6. Refusal to bargain with the union; 7. Unilateral changes in wages; 8. Unilateral changes in production rates and quotas; 9. Retaliatory changes in absenteeism enforcement; 10. Unlawful termination of employee benefits in retaliation for choosing to unionize; 11. Threats to reduce pay 12. Threats to abolish Christmas bonuses; 13. Threats to discharge black employees 14. Threats to discharge employees who held union meetings in their homes; 15. Threats to discharge employees who voted for the Union. Master Slack 271 NLRB 78, 79 (1984); Master Slack Corp., 230 NLRB 1054 (1977), enfd. 618 F.2d 6 (6th Cir. 1980)	1. When the ASW wanted to discuss the impending health plan, Comau said "OK." 2. On March 1, 2009 Comau did . . . nothing.

In addition, in *Master Slack*, although many of those past practices had been addressed in an earlier proceeding, there was still an ongoing back pay dispute arising out of those earlier unfair labor practices. That back pay dispute, like the imposition of new health care costs in the present case, was the subject of ongoing talk in the shop. As in the present case, the Administrative Law Judge allowed the Respondent to call only some of the 85 employees (representing a majority of the bargaining unit) who would have testified about why they signed the decertification petition in that case. As in the present case, the witnesses testified that the past

and ongoing disputes were not the cause of their votes to decertify, and that they just wanted to be rid of their union.

The ALJ found (and the Board affirmed) that the history of serious unfair labor practices and the existence of an ongoing back pay dispute arising out of those practices were insufficient to prevent the employees from making a free choice regarding their bargaining agent:

> It surely must be concluded that there is no direct evidence of a causal relationship between Respondent's unlawful conduct of 1973-1974 and the 1982 petition. Moreover, I further conclude that the indirect factors are insufficient here to operate as a matter of law to preclude Respondent from withdrawing recognition. In view of all the circumstances here, I find that Respondent lawfully suspended bargaining on August 16, 1982, and that it lawfully withdrew recognition from the Union on September 10, 1982. 271 NLRB at 85.

Thus, in *Master Slack*, there was a lengthy and egregious past history of employer misconduct toward union organizers, and an ongoing dispute about back pay which was so much the subject of frequent discussion in the plant that, "it became an unpleasant joke," Id. at 84. Nevertheless, the ALJ and the Board allowed those union employees to freely choose to decertify. The memory of the threats and firings, and the ongoing litigation over back pay, did not disqualify them from decertifying their union. Yet in this case, the GC insisted that the employees were incapable of making their own decisions because the health care plan, which they had known about since December, became effective on March 1, 2009.

In accepting that position, ALJ Carter relied on an argument that flies in the face of *Master Slack*. The disaffection petition included language explicitly denying that the employees were motivated by the implementation of the health care plan. ALJ Carter claimed that such language supported his finding that the health plan remained a point of concern for bargaining unit employees. (Decision, p 20, fn 40). But the present case is similar to *Master Slack* in that respect. In *Master Slack*, an unresolved back pay dispute, like the imposition of new health care

costs in the present case, was the subject of ongoing talk in the shop. Yet the ongoing awareness of the back pay dispute was insufficient to derail the decertification efforts. But to ALJ Carter, the acknowledgement of an ongoing issue was used for the opposite purpose, to refute the concerns of the employees. Thus, the employees were disenfranchised; if they denied the relevance of the issue, that meant it was relevant, but if they remained silent, the GC and the ALJ were free to find that it dominated their thinking. Once again, as throughout these proceedings, the voices of the employees themselves were deemed to be the least relevant and were given the least respect.

Another useful example of facts in relation to the "objective test" is the well-known case of *Saint Gobain Abrasives*, *Inc.,* 342 NLRB 434 (2004), which established the Board's obligation to hold a "St. Gobain" hearing before dismissing a decertification petition based on speculation about the employees' reasons for the petition. The facts of that case are almost as interesting as the legal precedent it established. Again, the employer in that case had engaged in serious and multiple unfair labor practices, resulting in multiple charges before the Board. Although the charges had been settled, the remedies had not been implemented.

St. Gobain	**Comau**
1.Promulgated unlawful solicitation or distribution rules; 2. Prohibited the distribution of union literature or removed such literature from employees' company mailboxes; 3. Spied on or interrogated employees engaging in union activities; 4. Threatened employees with lower compensation, the loss of benefits, or the withholding of an annual pay increase; 5. Threatened that employees who do not support the Union will receive better benefits; 6. Threatened plant closure;	1. When the ASW wanted to discuss the impending health plan, Comau said "OK." 2. On March 1, 2009 Comau did . . . nothing.

7. Solicited employee grievances; 8. Directed the distribution of pro-employer literature; 9. Interfered with employee labor organizations; 10. Suspended or discriminated against certain employees who actively supported the Union; 11. Failed or refused to bargain in good faith with the Union; 12. Changed job tasks of unit employees without bargaining; 13. Bypassed the Union and discussed such changes directly with the employees; and, 14. Failed to provide information requested by the Union.	

Even that lengthy list of bad employer behavior was not enough to result in an automatic finding of causation. The case was remanded to determine whether the facts to be adduced at the hearing supported the allegations of causation.

Again, as with *Master Slack*, there is a qualitative difference between the behavior of the employer in that case and Comau. The unfair labor practice in this case did not compare, qualitatively or quantitatively, with the multiple, frequent and serious unfair labor practices in those seminal cases. If those cases set the standard, the complaint in the present case should be dismissed and the employees should be allowed to choose their own union. Their right to choose their bargaining representative should not be so lightly disregarded.

Likewise, in *Champion Home Builders Co*., 350 NLRB 788, 791-792 (2007), the employer's conduct included the unlawful confiscation of union materials from an employee workstation, one-day employee layoffs, threats to close the business if picketing continued and a refusal to provide information requested by the Board. But even those unlawful practices were insufficient to justify setting aside the decertification of the union.

In *Champion Home Builders*, the Board gave examples of cases where the employer conduct was so egregious that it tainted the employees' disaffection:

> In each of these cases, the violations as described by the Board were of a more serious nature and were disseminated throughout the bargaining unit. In *Beverly Health*, the violations included the employer's denying union representatives access to the employees' facility, removal of bulletin boards that were used by the union to communicate with employees, unilateral reduction in the number of work hours of some unit employees, and changing of rules regarding vacation scheduling. Id., at 29. The employer also reduced the hours of an employee and terminated another employee because of her union support. In *Penn Tank Lines*, the employer unilaterally reduced the waiting-time and lost-time pay for drivers less than a month before the withdrawal of recognition. Id. at 1067. In addition, the employer unlawfully discharged an employee approximately 5 months before the withdrawal of recognition. In finding the employer's withdrawal of recognition unlawful, the Board reasoned that the passage of time did not diminish the impact of the employer's conduct, noting "that the discharge of an active union supporter is exceptionally coercive and not likely to be forgotten. . . . This unlawful conduct 'goes to the very heart of the Act,' and reinforces the employees' fear that they will lose employment if they persist in union activity." (Internal citations omitted). *Id*. at 792, fn 19.

The fact that the health plan became effective on March 1, 2009 pales in comparison with those kinds of activities. The GC utterly failed to show an objective causal connection between that alleged ULP and the employee disaffection, and the ALJ erred in accepting the faulty position of the GC.

C

The ALJ Misapplied *Master Slack* by Disregarding the Evidence of Other Reasons for the Disaffection

It was suggested above that *Master Slack* did not limit the ALJ to consideration of an objective standard. In that case, as in the present one, the respondent offered to present the testimony of all of those who had signed the petition. In *Master Slack*, the ALJ took the testimony of the first 20, but disallowed the remaining 65.

But in *Master* Slack, ALJ Linton neither ignored nor disregarded the testimony of those 20 witnesses. Instead, he quoted their testimony at some length (pages 84-85 of the opinion) and relied upon their testimony in considering the element of causation:

> No signer of the petition testified that any of the past or pending litigation had anything to do with his or her signing the petition.
>
> It surely must be concluded that there is no direct evidence of a causal relationship between Respondent's unlawful conduct of 1973-1974 and the 1982 petition. Moreover, I further conclude that the indirect factors are insufficient here to operate as a matter of law to preclude respondent from withdrawing recognition. 271 NLRB at 84.

It is clear from that language of that opinion that ALJ Linton considered the testimony of the witnesses regarding the impact of the ULP on their decision to sign the petition. It is also clear from the opinion that the ALJ did not require the employees to provide extensive reasoning for their decision, specifically quoting in his opinion the testimony of one Judy Wiggins:

> Q. Would you tell His Honor in your own words, as-in any way you want-why it was that you signed the petition?
> A. Because I didn't want the Union in the factory.
> Q. Can you tell His Honor why?
> A. I just didn't feel like it was doing any good. I just didn't want it there. 271 NLRB at 85.

Where ALJ Linton was willing to credit such generic and vague reasons for wanting to disassociate from a union, it would have been appropriate for ALJ Carter in this case to give credit to the numerous specific reasons expressed by the employees in this case, i.e., disgust with Pete Reuter, the loss of the union treasury, the failed training opportunities, the failure to deliver on promises of jobs and the monthly payment of substantial dues, etc. In contrast to "I just didn't want it there," the CEA asked that the ALJ in this case give credit to the written statements of each and every employee who signed the disaffection petition, which very specifically denied that it was related to the implementation of the health care plan ("and not because Comau Inc. in

the last year or so unilaterally implemented new terms of employment for us including the Company health care plan."). If ALJ Linton could credit the vague testimony in Master Slack, then so much more relevant was the written and verbal testimony of the members of the bargaining unit in this case, with their many and specific reasons for discontent.

All of the alternative reasons for disaffection are relevant, too, because they tend to show from where the disaffection arose. It is entirely reasonable to consider and infer that, if it arose from disgust with Pete Reuter, the loss of the union treasury, the failed training opportunities, the failure to deliver on promises of jobs and the monthly payment of substantial dues, it is less likely to have arisen from the alleged acts of the employer.

Instead, ALJ Carter placed all of his reliance on the so-called "objective test" of *Master Slack,* ignoring the true nature of the test established in that case. He disregarded the true test set forth in *Master Slack*, and reached a result that is inconsistent with that case and with substantial justice.

ALJ Carter noted, in passing, that the employees had been dissatisfied with the ASW for a long time (Decision, pp 7-8) and for many reasons (Id., and p 19, fn 35). But he tossed those reasons aside, deeming them to be of no relevance, since he believed that there could be some causal relation between the unfair labor practice and some of the discontent. In other words, he construed *Master Slack* to mean that if some causal connection exists, all other testimony, facts, background and reality are to be disregarded. This narrow view of *Master Slack* is inconsistent with the case itself (as noted above) and is inconsistent with due process and substantial justice.

An example will explain. Suppose, hypothetically, that union officers were systematically bullying members, that dues were 50% of wages, that the union leaders systematically harassed any opposition, and that the union conceded virtually every demand of management in

negotiations. Imagine that, as in this case, the employer had unilaterally implemented a health care plan when impasse had been broken. Finally, imagine that the employees sought to decertify the offending union and choose another one.

Under *Master Slack*, all of those nefarious and improper actions of the union would have been relevant. ALJ Linton might not have taken the testimony of every single employee, but, as in *Master Slack*, he would have taken testimony about the opinions of the members and would have given it consideration.

In contrast, under the narrow interpretation of *Master Slack* adopted by ALJ Carter, none of those facts would be relevant. It would not matter that the employees had good and multiple reasons for wanting to change unions, or that those reasons had existed for a long time. That testimony would be relegated to a footnote, and the disaffection petition would be dismissed because the employer had committed an unfair labor practice.

Master Slack does not require the ALJ to dismiss all of the testimony of the employees. The "objective test" does not require the ALJ to ignore alternative reasons that could explain the discontent. It does require the ALJ to consider whether the employer's action is of a kind that could cause discontent, but it doesn't require the ALJ to disregard the remainder of real life in the affected workplace.

D

The ALJ Erred by Applying an Incorrect Standard with Regard to Causation of the Employee Disaffection

In beginning his analysis of this issue, ALJ Carter stated that: "The question in dispute is whether there is "a causal relationship" between the March 1, 2009 unfair labor practice and the loss of majority support for the ASW/MRCC that was evident on December 22, 2009." That was an incomplete, and hence incorrect, statement of the correct standard. In many cases, it would

have had no impact on the outcome of the case, but in the present case, it was decisively incorrect.

ALJ Carter's formulation works well enough where only one potential cause of the disaffection has been alleged. But it leads to error where there is more than one potential cause. According to the Carter formulation, where the disaffection is the result of many causes, any one of those causes, no matter how small, trivial or insignificant, can be held to constitute "the" cause of employee disaffection, thereby depriving the employees of their Section 7 rights.

The case law of this Board requires more:

> "For the disaffection to be attributable to the unfair labor practices, they "must have caused the employee disaffection... or at least had a `meaningful impact' in bringing about that disaffection." Deblin Mfg. Corp., 208 N.L.R.B. 392 (1974).

In the present case, it cannot be denied the March 1, 2009 unfair labor practice affected at least some of the employees. But as has been shown above, and as is clear from the record as a whole, there was a substantial amount of disaffection before the alleged ULP had even occurred, and that disaffection arose from a variety of causes. ALJ Carter was certainly aware of those reasons, but in his Decision, he relegated them to a footnote. (Decision, p 19, fn 35). Instead, he should have determined whether those reasons caused the disaffection.

ALJ Carter's own words point to the importance of those other factors, even as he dismisses their importance. In the Decision, he observed that:

> Thus, the December 2009 disaffection petition was essentially an effort to renew the Spring 2009 decertification movement that started just before the unilaterally imposed healthcare plan (unlawfully) took effect. (Decision, p 19)

ALJ Carter recognized that the Spring 2009 decertification movement started before the ULP. It was caused by the factors that ALJ Carter listed in footnote 35. Since he saw the disaffection petition as an effort to renew that decertification movement, he should have given

credit to, and should have evaluated and considered, the role that those other reasons had in the later disaffection movement. There was no evidence whatsoever that any of those other causes had diminished, that employee anger about them had declined, or that any of the underlying problems had been resolved. By failing to do so, ALJ Carter applied a "mere cause" standard, or a "one of many causes" standard, rather than the standard of actual causation required by the case law of this Board.

E

The ALJ Erred in Refusing to Hear the Testimony of Bargaining Unit Members

During the evidentiary hearing, counsel for Respondent CEA proffered the testimony of 90 witnesses, all members of the bargaining unit, for the purpose of showing that the disaffection with the ASW/MRCC proceeded from many causes other than the unfair labor practice, many of which preceded the unfair labor practice. ALJ Carter refused to hear the testimony. (Tr 1205-1208) He stated that, even if all of those witnesses testified that they had become disaffected for of other reasons, their testimony would not be probative. (Tr 1208) That ruling logically follows from ALJ Carter's incorrectly narrow understanding of *Master Slack*, and from the "mere cause" or "one of many causes" standard that resulted. As a result, the evidentiary ruling, too, was incorrect.

Again, in cases where there is only one alleged cause of the employee disaffection, ALJ Carter's approach might suffice. But where the employees testified to a number of valid and significant reasons for being dissatisfied, and where the record showed that the dissatisfaction had substantially developed before the unfair labor practice, the ALJ had a responsibility to allow the record to develop, so both he and this Board could fairly determine whether the

employees had had valid and material reasons for disaffection aside form the unfair labor practice.

Instead, the ALJ ruled that the other reasons were irrelevant. He therefore precluded the testimony. In doing so, he silenced the employees, and erred.

II

The ALJ Should Have Found That Harry Yale, James Reno And Nelson Burbo III Were Not Agents Of The Employer

The GC also argued that the December 2009 disaffection petition does not represent the true beliefs of the employees because leaders participated in the process of obtaining the petition signatures. That position is demonstrably false for a number of reasons. ALJ Carter made findings about many of the relevant facts (not always correctly), but declined to rule that the leaders in question were not agents of management. The ALJ should have found that they were not agents.

First, leaders are rank-and-file employees, not supervisors. As noted in the Statement of the Case, leaders have historically played a role in union activities, and several are on the current executive board of the ASW. No one complained about Mr. Yale's status as a leader when he was an officer of the ASW, but when he acted on behalf of the CEA, suddenly he is alleged to be a company agent. In its role as an honest broker in labor relations, it is questionable for the GC to argue that leaders are company agents when they work for the CEA, but that they are not company agents when they work for the ASW. The truth, of course, is that leaders are not company agents in either context, and that neither the CEA nor the ASW is controlled by or influenced by the employer.

Second, two of the three named leaders had virtually nothing to do with the December, 2009 disaffection petition process. In the Consolidated and Amended Complaint, the GC referred

to the trio of Harry Yale, Nelson Burbo III, and James Reno as the ones who circulated the petition. But the evidence shows that neither Mr. Burbo nor Mr. Reno had a meaningful role in the petition process.

The GC called one witness (out of 178 bargaining unit members) to show that Messrs. Burbo and Reno used their status as leaders to cause the petition to go forward. Mr. Richard Mroz testified that his leader at the time was Nelson Burbo. (Tr 157). One day, Mr. Burbo came up to him and asked whether he was happy with the union or with the results. Mr. Mroz said he wasn't, but thought it might be premature to get out of the ASW at that time. Mr. Burbo "kind of agreed with that much of it." That was the end of the conversation. (Tr 159).

Another leader in the building was Jim Reno, to whom Mr. Mroz turned when Mr. Burbo was not in. (Tr 157). On another occasion, Mr. Reno came up to Mr. Mroz, told him that Harry Yale was in the shop, and asked whether he wanted to talk to Harry Yale. Mr. Mroz testified:

> "And I says yeah, I'd like to talk. I've got a few questions for him. . . . Jim Reno brought Harry Yale over, and Nelson happened to be with them at that particular time. And I says listen, I'd like to talk to Harry alone. So, they both took off, and I asked Mr. Harry Yale about this decertification letter, and he says yeah, that's true." (Tr 159-160).

Those two brief conversations constitute the GC's entire basis for connecting Mr. Burbo and Mr. Reno with the disaffection petition. There is no other testimony in the record about any other actions by either Mr. Burbo or Mr. Reno to circulate or otherwise advance the disaffection petition. There was nothing coercive about the conversation. The GC utterly failed to introduce even a scintilla of evidence that either of those gentlemen had any role, as leaders or otherwise, in the disaffection petition. In fact, they had nothing to do with it. The ALJ erred in not making an explicit finding that Mr. Burbo and Mr. Reno were not agents of the employer.

But what of Mr. Yale? Didn't he use his position as a leader to improperly influence Mr. Mroz? The GC's questioning of Mr. Mroz continued:

24 Q. Okay, and do you know who Harry Yale -- or at that time,
25 did you know who Harry Yale was?

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1 A. I know who he was.
2 Q. And who was he?
3 A. He was a regular worker, you know, just known him through
4 the years.
5 Q. All right, did he work at your shop?
6 A. As far as I know, he didn't. But it's a big building. He
7 might have been somewhere down the line. I don't know.

(Tr 159-160; emphasis added)

In his own words, Mr. Mroz was not aware that Mr. Yale was a leader. So Mr. Yale's leader status clearly had no influence upon him.

The GC produced absolutely no other evidence of an attempt by a leader to influence the employees to sign the petition. The GC produced absolutely no evidence that leaders advocated for the petition, or even made their opinions known to the membership. Other than the limited involvement of Harry Yale, the GC produced no evidence that leaders were involved in any way in the process.

In fact, despite the GC's proffer of the inconclusive testimony of Mr. Mroz, the GC's entire case against the leaders is based on the idea that leaders are given so much authority by the employer that the rest of the employees believe them to speak for the company, apparently on all matters, including labor relations. That idea is not supported by the law or by the facts of this case.

Once again, the burden of proving this allegation is on the GC:

> The burden of proving an agency relationship is on the party asserting its existence. *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994); *Pierce Corp.*, 288 NLRB 97, 101, fn. 65 (1988), citing *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948).

More importantly, the Board's proof must address the specific conduct of the alleged agent, not merely some vague concept of agency in general:

> The party who has the burden to prove agency must establish agency relationship with regard to specific conduct that is alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001) (emphasis added).

In the present case, the GC has elicited some facts which, taken out of context, are used to try to make the argument that leaders are agents for management. However, even if the GC could convincingly show that its position were true, it would be irrelevant. Regardless of whether leaders were agents for Comau for the purposes of allocating work, reworking mistakes or other production-related business, there is no evidence whatsoever that they were agents for labor relations purposes. In the complete absence of evidence on this point, the GC's case failed, and the ALJ erred in not making the specific finding that Mr. Yale was not an agent of the employer.

In fact, the necessary showing of agency is even more stringent; the GC must show that the alleged agents reflected company policy and spoke for management:

> The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB 425 (1987), at 426–427 (and cases cited therein) (emphasis added)

There is no evidence whatsoever that anyone at Comau did believe, or could reasonably have believed, that Harry Yale was reflecting company policy or speaking or acting for management in matters of union preferences, union activities, or any other labor-relations-related matter. Even the testimony of Mr. Mroz, upon whom the GC almost exclusively relies, does not establish that he thought any leader reflected company policy. Rather, he was concerned about how his leaders might personally feel if he disagreed with them. He was not concerned about

how the company might react; he was concerned about whether or not a leader would take it personally:

3 Q. Okay, and did your leader's support of the petition have
4 any effect on your decision to sign?
5 A. Well, it did make you kind of wonder, because they do have
6 a lot of influence. And if your leaders sign it, and they
7 think highly of it, if you go against it, you don't know
8 what's going to happen. But the information that I got from
9 Mr. Yale did influence me that maybe I ought to sign this
10 thing. And actually, it turned out to be to me the best
11 decision. I think being with the CEA has helped me thus far
12 more than the MRCC through the last several years. (Tr
163)(emphasis added)

There is nothing in Mr. Mroz's statement, or anywhere else in the record, to indicate that anyone at Comau had a reason to think that the leaders spoke for management on this or related matters.

It should be noted that Mr. Mroz ultimately did not sign the petition because he was concerned about his leaders or his job. He signed because Harry Yale's statements made sense to him (he did not know Mr. Yale was a leader), because his leaders had signed it, because so many coworkers had signed it and, most importantly, because his brother, whom he trusted above all others, had signed it. In fact, leaders or not, he wouldn't sign the petition until he had ascertained that his brother had, in fact, signed it first:

Q. Could you tell me why you did that [signed the petition in
December]?
2 A. I did it -- I did it for several reasons. A lot of the
3 things that Mr. Harry Yale had to explain kind of connected
4 the dots with the former Union for me. The part that my
5 leaders signed it, that influenced me to do that. The part
6 that the amount of people that already signed it influenced me
7 to sign it. Also, my brother signed it, and my brother is the
8 only one I really trust. (Tr 183)

The ALJ later pursued the issue:

JUDGE CARTER: Did you talk to your brother about signing

6 the petition for decertification before you signed the
7 petition or afterwards?
8 THE WITNESS: Actually, when Harry says that my brother
9 signed it, I actually went over and asked my brother first if
10 he did, and he says yes, so I saw Harry a few minutes later,
11 and I went and signed it. (Tr 192)

The GC has failed to show that, either actually or constructively, leaders spoke for management on labor issues, that anyone in the bargaining unit thought they spoke for management on labor issues, or that the employer acted in any way to give the impression that leaders spoke for management on labor issues.

Leaders are members of the bargaining unit, and are specifically included in the collective bargaining agreement. (Respondent Union Exhibit 9, pp 43-47; GC Exhibit 32, pp 45-52). The Board has held that the conduct of even statutory supervisors who are also bargaining unit members will not be imputed to the employer "in the absence of evidence that the employer encouraged, authorized, or ratified" such conduct or that the employer "acted in such [a] manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management." *Montgomery Ward & Co*., 115 NLRB 645, 647 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957)

In this case, there is no evidence whatsoever that the employer "encouraged, authorized, or ratified" their conduct or that the employer acted in a manner which would lead the employees to believe that Yale, Reno or Burbo were acting for or on behalf of management. In the complete absence of evidence, it was error for the ALJ to fail to make the appropriate finding, i.e., that Yale, Reno and Burbo were not agents of the employer.

At 29 USC §152, the NLRA defines an employer as follows:

> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor

> Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (emphasis added).

There is no question about the fact that Harry Yale was acting as an agent of the CEA in making the disaffection petition available for signatures. By definition, then, he was not an agent for the employer. The GC cannot meet the threshold for showing that leaders were company agents in this case.

III

The ALJ Erred In Finding That The Actions Of Fred Had A Reasonable Tendency To Coerce Jeffrey T. Brown To Sign The Lutz Checkoff Authorization Form

The ALJ found that in a single instance, the actions Fred Lutz, the CEA treasurer, had had a reasonable tendency to coerce a bargaining unit member, Jeffrey T. Brown, to sign a dues-checkoff authorization form. That finding was incorrect.

Both Mr. Brown and Mr. Lutz testified about the events in question. Both agreed that there had been a series of conversations about the dues-checkoff form. Mr. Lutz testified (Tr pp 732-738) that there had been four conversations. In the first, Brown said he wanted a copy of the "Beck Laws" and Lutz, not knowing what that meant, said he'd have to get back to him. In the second, Brown admitted that he didn't know what it meant, either. There is no suggestion of coercion in either of those conversations. The third conversation proceeded as follows:

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4 Q. And what was now the third conversation?
5 A. I asked him did he look at the sheet, Exhibit 36 sheet [the blank dues
authorization form].
6 Q. And what did he say?
7 A. He said he really hadn't had time yet but he was going
8 to look at it that afternoon and I could get back with him.
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There is no claim that the third conversation was coercive.

Brown remembered only three conversations. (Tr 497) (He originally testified that there had been two (Tr 495), but actually described three). Neither of the first two conversations could

be construed as coercive. In the first, Lutz said "he would get with me later. I said, okay, whatever," (Tr 495) and in the second, "I says I'm busy right now. Give me the paperwork. I'll take a look at it, and he gave me the paperwork. I went back to work. I did not sign it that day." (Tr 496).

In the critical final conversation, Brown testified that he offered to pay cash for the entire year, i.e., $240. (Tr 497) Lutz (who was new at being treasurer (Tr 737)) said he had to ask Mr. Begle (Tr 497), so they went to Begle's office. Brown again offered to pay $240 in cash, and Begle liked the idea. (Tr 499) Lutz asked "well, what if you're laid off in six months?" Brown didn't respond "because I didn't know where he was going with that." (Id) The obvious answer was that Brown would have paid in advance for a full year, but would not be liable for dues if he were laid off during that time, though that was not addressed by either party. Instead, what followed was "chitchat" which even Brown failed to allege was in any way coercive. (Tr 499) Brown then handed over the dues authorization form which he had already signed and which he had brought with him to the meeting:

19 Q. What happened next?
20 A. There was some, you know, minor chitchat, and I finally,
21 you know, I said, you know, I'm done with this. I've got a
22 signed copy right here in my clipboard. Here's my signed
23 copy. Have a nice day, and I left.

Brown himself testified that he had signed the form before the allegedly coercive final conversation, and that he had brought it with him. He turned it over after some "minor chitchat." No one ever said he had to do so; no one ever threatened him or his job in any way if he didn't sign. Begle had liked the idea of the dues being paid in cash. There was nothing coercive about the conversation or the circumstances. The ALJ erred in interpreting the events as he did.

IV

The ALJ Erred in Proposing Remedies That Would Disenfranchise Members of the Bargaining Unit

The ALJ has concluded that the appropriate response to the alleged "event" of March 1, 2009 is to set aside the disaffection petition, eviscerate the union chosen by majority of the employees and force the employees to accept representation by the ASW, a union which a clear majority of the employees have twice rejected. In evaluating that proposed remedy, it would be well to consider again the very reasons for the existence of the National Labor Relations Act itself:

> It is hereby declared to be the policy of the United States… [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing… 29 USC §151.

In this case, the employees have expressed their view of the ASW not once, but twice (three times, if one counts the vote in favor of the May 14, 2010 collective bargaining agreement which recognizes the CEA; four times if one counts the initial decision of the ASW Executive Board to disaffiliate from the MRCC). But what could be more dismissive of the rights of the employees, and more disruptive of industrial peace, than removing a union chosen, twice, by a majority of the bargaining unit, and substituting in its place a union which the membership has repeatedly rejected, and which even its own Executive Board had voted to decertify?

Yet the ALJ proposes relief which would do exactly that, and which would compel the employer to bargain with the ASW as if it represented the employees. Even if it were true that the alleged March 1 ULP had caused the employee disaffection, such an extreme remedy would not be automatic:

> [A]n affirmative bargaining order is an extreme remedy that must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' S 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives;

> and (3) whether alternative remedies are adequate to remedy the violations of the Act. *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000)

In this case, the employees' antipathy toward the ASW is clear. Mr. Molloy, the ASW's own vice-president, emotionally described how he had been disappointed in Pete Reuter and in the lack of jobs (Tr 796), how the ASW leadership had threatened to sue him and others, and had threatened to get rid of any one at any time because he was the director and could do it (Tr 799), and recalled his ASW experience as:

> Everything was always blue skies and sunshine. And I'm an idiot because I listened and I believed it for years … (Tr 828)
>
> ****
>
> I felt I let the men down, I felt I let everybody down and I thought this big Union was going to help us and do stuff for us and I helped promote it. I thought that it was -- I -- you know, I wanted this Union in here. I thought this would be great. And then when everything just -- nothing happened, we got nothing and everything just fell apart, I just -- I was -- I just … I just felt wrecked. (Tr 833-834)

Even Mr. Mroz, the GC's only witness on the subject of leader agency, stated that, in his opinion, the CEA had helped him more than the ASW/MRCC had during the last several years. (Tr 163) It is difficult to imagine those employees having any confidence in the collective bargaining process or in the good offices of the Board once they have been forced to treat the negotiating team of the ASW as their own.

The GC will undoubtedly assert that all they seek is a return to the status quo ante. But it is easier to talk about the "status quo ante" in the abstract than it is to apply it in this case. In fact, there are a number of potential statuses which could lay claim to being the proper 'status quo ante.'

As set forth above, the bargaining unit has spent most of the last 30 years or so represented by a small, independent union. It was first known as the PEA, then as the ASW, and

the officers were people in the shop, who worked side-by-side with the other members of the bargaining unit. It remained the same small, independent union until the short and ill-fated experiment with big-union affiliation with the MRCC which began in March, 2007.

During the experiment, the ASW affiliated with the MRCC. Its director and business agent/ president stopped working for Comau and became full-time employees of the MRCC. The president of the local testified that he visited the plant about once a month after that; the director was rarely seen and was hard to get in touch with. (Tr 147, 790)

That experiment lasted less than 2 years, until early 2009, when the majority of the bargaining unit, including virtually all of the Executive Board of the ASW 1123 itself, decided to abandon the experiment and return to the small union model, which would be embodied in the Respondent CEA.[5] Although the experiment was artificially prolonged by the Board's inaction, a significant majority of the employees engaged in self-help and successfully chose the CEA as their bargaining representative in December of 2009.

So there are several relevant time periods, and it is a legitimate question which one represents the true 'status quo ante"

The CEA suggests that the employees have already returned to the true status quo ante, i.e., representation by a small, independent union run by their co-workers and not dominated by the money, employees or political power of a larger union; they are represented by a union which has majority support and which has already negotiated a collective bargaining agreement for them. The GC would have the ALJ return the parties to the temporary, interim MRCC period, to the blip on the radar, as it were.

[5] The experiment was artificially prolonged until December of 2009 by the Board, which ignored the clear wishes of a majority of the employees and refused to permit an election; the Board's delay in responding to the employees' election request has now reached 18 months and counting.

In fact, even a return to that interim period is no longer possible. The status existing before March 1, 2009 has been permanently altered by the ASW 1123 itself, and cannot be reinstated.

In March of 2007, the members of the bargaining unit voted to affiliate with the MRCC. Whether or not they made a mistake, the fact remains that they selected the MRCC by a legitimate vote in a free election. But the MRCC is no longer part of this case. On March 1, 2010, the ASW 1123 disaffiliated from the MRCC and became an affiliate of the Carpenters Industrial Council (CIC). (Tr 104) The employees have never voted to accept the CIC as their bargaining representative. A majority have clearly stated their aversion to, and even fear of, the CIC. The Board has not shown that it (or the ALJ) has the authority to force the employees to accept as their bargaining representative a union they have never elected. Moreover, it is contrary to the provisions of the NLRA to force the employer to bargain with a union which does not represent its employees.

This impossibility of returning to the status quo ante is not the result of any action by the employer or the Respondent CEA. It is solely the result of a choice made by the ASW. Where the party seeking relief has itself made the relief impossible, relief should be denied.

In *Timmins* v *Narricot Industries*, 567 F. Supp. 2d 835 (E.D. Va. 2008), the bargaining unit had been represented by its union for 30 years. Prior to the expiration of the last collective bargaining agreement, the employer notified the union that it was withdrawing recognition effective upon expiration of the contract, because a majority of the unit had signed a petition stating that they no longer wish to be represented by the union. The District Court declined to grant the Region's request for injunctive relief in that case, citing fundamental reasons which are

applicable here. First, the court pointed out that an important interest which might suffer irreparable harm was that of:

> [T]he employees who do not want to be represented by the Union, including those who worked in earnest to remove it, [who] will suffer irreparable harm if this court orders reinstatement of a Union which a majority of Narricot's employees do not wish to represent them. (567 F. Supp. 2d at 844).

Furthermore, to mandate the recognition of the Union:

> would unduly infringe on the § 7 rights of those Narricot employees … who have expressed a clear desire not to be represented by the Union. (Id. at 847)

Because:

> [Section 7] guards with equal jealousy employees' ***s***election of the union of their choice and their decision not to be represented at all. (internal citations omitted) It would not be just and proper, in essence, to punish the employees for their employers *subsequent*, but impermissible, involvement in their decertification effort. (Emphasis in original) (Id.)

In *Narricot*, the Court observed that the decertification effort had originated with Narricot employees:

> "separate and apart, and well before, any involvement or unlawful conduct by Narricot. It is also clear that support for the Union… was waning prior to Narricot's unfair labor practices. Because it is not possible to determine exactly how much of the decertification petition was "tainted" by Narricot's impermissible participation, and because it is clear that a substantial number of signatures was obtained free from any involvement by Narricot, an order revoking the decertification effort would neither serve the remedial purposes of the Act nor properly restore the status quo." (Id. at 846)

Likewise in the present case, the record indicates that employee support had waned significantly before the alleged unfair labor practice of the employer. Both the original decertification petition and the disaffection petition were prepared and circulated by the employees themselves. The vast majority of the signatures on the decertification petition preceded the alleged unfair labor practice. As in *Narricot*, it would tread on the legitimate

Section 7 rights of those employees to impose upon them the ASW/CIC, a union which they fear, don't want and have repeatedly rejected.

CONCLUSION

Section 7 of the National Labor Relations Act guarantees to employees the right to form labor organizations and to "to bargain collectively through representatives of their own choosing." 29 USC §157. The employees of this bargaining unit have on multiple occasions clearly expressed their position that they do not want the ASW to represent them, and that they did want to be represented by the CEA. The General Counsel bore the burden of showing that those free and explicit rejections of the ASW should be set aside, and failed to meet that burden. The ALJ erred in his findings of fact, conclusions of law and proposed remedies.

REQUEST FOR RELIEF

For all of the reasons set forth above, Respondent CEA requests that the Board respect the wishes of the men and women of the bargaining unit, reject the recommended opinion of the ALJ, and leave intact this bargaining unit's choice of bargaining representative.

Respectfully submitted,

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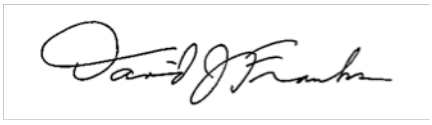

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Dated: February 14, 2011

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

COMAU, INC.
Respondent Employer

and **Cases 7-CA-52614 and 7-CA-52939**

AUTOMATED SYSTEMS WORKERS LOCAL 1123, affiliated with CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
Charging Party

and

COMAU EMPLOYEES ASSOCIATION (CEA)
Party in Interest

COMAU EMPLOYEES ASSOCIATION (CEA)
Respondent Union

and **Case 7-CB-16912**

AUTOMATED SYSTEMS WORKERS LOCAL 1123, affiliated with CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
Charging Party

PROOF OF SERVICE

I hereby certify that on February 14, 2011, I caused to be served via electronic mail a copy of the following: **Respondent CEA's Exceptions to Administrative Law Judge's Decision** and **Brief in Support of Exceptions** and this **Proof of Service** upon the following (see attached):

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